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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,
Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of Philip Lewis,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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36 pp

QUESTION PRESENTED

Does a plaintiff state a cause of action for an allegedly wrongful death, under 42 U. S. C. § 1983 and "substantive due process," when the injury causing death was accidental and state remedies are adequate?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITIONERS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioners. Counsel for petitioners has consented, but counsel for respondents has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to the detection and capture of criminals, the rapid, efficient and reliable determination of guilt, and the swift execution of punishment.

In this case, plaintiffs seek to constitutionalize the question of a civil liability for police pursuits without a seizure. If they succeed, they will disrupt the tort system already in place for these kinds of claims, increase liability and litigation costs for local governments, and cause police to forego pursuits which should be made. As a result, many dangerous felons will escape, and the financial ability of local governments to protect their citizens will be impaired. These results would be contrary to the purposes for which CJLF was formed, and CJLF therefore has an interest in the case.

For the foregoing reasons, *amicus* requests leave to file its brief.

August, 1997

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

SUMMARY OF FACTS AND CASE

The present case came to the Court of Appeals on summary judgment, and that court therefore presumed the facts in the light most favorable to the plaintiffs.[1] *Lewis* v. *Sacramento County*, 98 F. 3d 434, 436 (CA9 1996). The presumed facts as stated in the opinion may be briefly summarized as follows.

Defendant James Smith, a sheriff's deputy employed by defendant County of Sacramento, responded to a call to break up a fight. *Ibid.* Officer Stapp responded to the same call. After handling the call, both officers returned to their cars. Deputy Smith saw Officer Stapp's lights come on, heard him yell something at two boys on a motorcycle, and saw him

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

maneuver his car in an unsuccessful attempt to stop the motorcycle from leaving.

The motorcycle was driven by Brian Willard. The decedent, Philip Lewis, was a passenger. Willard evaded Stapp's attempt to detain him and accelerated away. *Ibid.* This would appear to be a misdemeanor violation of California Vehicle Code § 2800.1(a).[2]

Deputy Smith pursued Willard.

> "The pursuit lasted about seventy-five seconds and covered approximately 1.3 miles. Posted speed limits were as low as 30 miles per hour. The average speed of the vehicles was calculated to be 60 miles per hour with high speeds of up to 100 miles per hour. The pursuit went through four stop lights and three ninety degree turns." 98 F. 3d., at 436.

In other words, Willard committed a violation of California Vehicle Code § 2800.2, a felony.[3] Neither the Court of Appeals' opinion nor the Brief in Opposition indicates any justification whatever for Willard's actions.

Willard "went over a crest in the road, attempted to make a hard left turn, and skidded to a halt." 98 F. 3d, at 437. Deputy Smith came over the hill and was unable to stop in time. His car hit Philip Lewis, who died at the scene. Willard was not injured significantly. *Ibid.*

Lewis' parents sued Sacramento County, the Sheriff's Department, and Deputy Smith. Brian Willard, the perpetrator of the felony which resulted in Philip Lewis' death, is not named as defendant in this action. Plaintiffs filed in state court,

2. That section prohibits fleeing if a distinctively marked vehicle, operated by a peace officer, has its red lights on and sounds a siren "as may reasonably be necessary." Under these circumstances, the siren appears not to have been necessary.

3. More precisely, this offense is punishable by either felony punishment (state prison) or misdemeanor punishment (county jail or fine) in the discretion of the court. *Ibid.* This type of offense is known colloquially as a "wobbler."

claim under 42 U. S. C. § 1983. Defendants removed the case to federal court and moved for summary judgment. *Ibid.*

The district court granted summary judgment for defendants on all federal questions and dismissed the pendent state law claims without prejudice. *Ibid.* The Court of Appeals reversed as to Deputy Smith. The court held that "deliberate indifference" was the standard for pursuit cases. *Id.*, at 441. The court also concluded that Deputy Smith was not entitled to qualified immunity. *Id.*, at 445.[4]

SUMMARY OF ARGUMENT

The parties in this case differ primarily over what standard should apply to an unintended deprivation of life or liberty in a "substantive due process" case. There is, however, an antecedent question of whether "substantive due process" applies to such deprivations *at all*. Further, there is the question of whether the rule of *Parratt* v. *Taylor* can be evaded simply by relabeling a due process claim as "substantive" rather than "procedural."

Of all doctrines of constitutional law, substantive due process carries the greatest danger to the people's constitutional right of self-government. Its lack of either guideposts or inherent boundaries make it a vehicle of potentially enormous breadth for the judiciary to override the popular will with the policy preferences of its members.

Police pursuit has costs and benefits. Weighing these against each other is a task better suited to other branches of government. Pursuits do result in some accidents and a few deaths, but they also result in the capture of a large number of felons, even though the felony status of the pursued person may not be apparent at the time the pursuit is begun. Furthermore,

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4. *Amicus* will not address the immunity issue in this brief. The error in the decision below is patent, see Pet. for Cert. 23-27, and it warrants reversal on straightforward application of existing precedents.

the cost of a highly restrictive pursuit policy would be a license to escape merely by driving recklessly. If pursuit policy is to be driven by fear of lawsuits, that policy will be weighted toward minimizing risks for which the agency can be sued, such as pursuits, while exposing the public to greater risks for which it cannot, such as the felons and intoxicated drivers who would otherwise have been caught.

The people and Legislature of California have already weighed the competing interests and struck a reasonable balance. California law provides immunity for the individual officer and a tort action, with some limitations, against government entities for negligent operation of vehicles by their employees. Creation of a federal tort for automobile accidents would shatter the balance achieved through the democratic process.

Substantive due process does not have the inherent boundaries of Fourth and Eighth Amendment claims. That is, it is not limited to seizures or to convicted persons. A vague standard is therefore far more dangerous in this area than in the others. Such a standard would chill the legitimate exercise of lawful police powers in the vitally important area of public safety. This problem is best avoided by limiting substantive due process claims to intentional deprivations.

Most substantive due process claims challenge a choice of substantive law made by the legislative authority. In that context, the availability of state judicial process cannot negate a violation. In the context of a "constitutional tort" suit, however, state processes can and should be a factor in the equation. When the state provides an adequate postdeprivation remedy, as California has in the present case, it has provided the process due, and there is no constitutional violation.

ARGUMENT

I. "Substantive due process" risks violating the constitutional right of self-government and should not be further expanded.

Plaintiffs in this case seek to expand the concept of "substantive due process" into a new field of law, one which had previously been governed by statute and common law. This argument bears a heavy burden, as this Court recently explained in *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4674 (June 26, 1997).

> "But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins* [v. *Harker Heights*], 503 U. S. [115], 125 [1992]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, [Citation]."

"Reluctant" may be an understatement. Substantive due process is a treacherous field. See *Albright* v. *Oliver*, 510 U. S. 266, 281 (1994) (Ginsburg, J., concurring). The reason why it is treacherous goes to the very heart of the Constitution.

The Constitution contains three basic kinds of provisions. Structural provisions set up the various organs of government and specify how their members are chosen. See, *e.g.*, U. S. Const., Art. I, § 2, cl. 1 (election of Representatives). Some provisions establish rules of law, placing these rules outside of the legislative power. The Bill of Rights and section 1 of each of the Civil War amendments are the most important of these. Finally, other provisions allocate power among the various branches and levels of government. Article I, section 8 sets

forth the federal legislative power, and the Tenth Amendment confirms that all powers not otherwise assigned or prohibited are reserved to the states and the people.

Whenever a court is asked to broadly interpret the substantive rules provisions of the Constitution, it runs the risk of violating the allocation of power provisions. If the Constitution says that Question X is a matter of state law, and a court declares it to be a matter of federal constitutional law, then the court has violated the constitutional right of the people of each state to decide Question X for themselves through the democratic process. Such a violation is every bit as grave as a legislature's or executive officer's violation of the Bill of Rights.

City of Boerne v. *Flores*, 521 U. S. ___, 65 U. S. L. W. 4612 (June 26, 1997) illustrates how the Constitution can be violated in the name of enforcing it. By expanding the right of free exercise of religion, Congress attempted to diminish the constitutional right of the people of the states and localities to decide for themselves those questions which are neither decided by the Constitution nor assigned to the federal government. "Congress does not enforce a constitutional right by changing what the right is." *Id.*, at 4615. Such a power would upset the federal balance. See *id.*, at 4620.

The federal balance is equally threatened by expansive judicial interpretations of the Constitution's substantive provisions. While the legislative branch can violate the separation of powers by intruding upon the judicial power to interpret the Constitution, see *ibid.*, the judiciary commits an equal violation when it misuses the interpretative power to usurp for itself a decision which the Constitution actually assigns to the democratic process.

Of all constitutional doctrines, "substantive due process" presents the greatest danger of judicial overreaching. Some of the darkest days in American judicial history have involved the misuse of that doctrine by courts to "substitute their own pleasure to the constitutional intentions of the legislature." See

The Federalist No. 78, pp. 468-469 (C. Rossiter ed. 1961) (A. Hamilton). *Dred Scott* v. *Sandford*, 19 How. 393 (1857) found in the Due Process Clause a constitutional right to own slaves in a territory where Congress had abolished slavery. See *id.*, at 450-451. *Lochner* v. *New York*, 198 U. S. 45, 53, 57 (1905) found a constitutional right to liberty of contract that overrode a statutory maximum on working hours. *Adkins* v. *Children's Hospital*, 261 U. S. 525, 559 (1923) struck down a minimum wage law. See *Washington* v. *Glucksberg*, *supra*, 65 U. S. L. W., at 4685-4686 (Souter, J., concurring in the judgment).

These cases are, of course, "now condemned with virtual unanimity as disastrous mistakes of substantive due process review." *Id.*, at 14. But they are more than that. The ghosts of these discredited decisions stand as a warning against the temptation to sweep all important decisions into the judicial power, leaving only minor questions to the democratic process. See *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 858 (CA9 1996) (Kleinfeld, J., dissenting), rev'd in *Glucksberg*, *supra*.

The traditional reluctance to expand substantive due process should be applied in the present case. *Amicus* submits that the time has come to address the position taken by Justice Powell in *Parratt* v. *Taylor*, 451 U. S. 527, 548-549 (1981) (opinion concurring in the judgment). Substantive due process claims should be limited to intentional deprivations. Alternatively, much the same result can be achieved through the approach of Justice Kennedy's concurrence in *Albright*, *supra*, 510 U. S., at 285. "Substantive due process" includes postdeprivation remedies, and where the state provides them for an unauthorized act it has provided the process due.

II. Police pursuit involves competing costs and benefits better weighed by other branches of government.

A. Costs and Benefits of Police Pursuit.

When a suspect in a vehicle flees from a police officer attempting to make a valid stop, the officer is faced with a choice between letting the suspect escape or incurring the risks of the chase. That choice is a form of cost-benefit analysis. Under what circumstances do the benefits of conducting the chase outweigh the cost of incurring the risks? The immediate question before this Court is whether this cost-benefit analysis should be constitutionalized and taken over by the federal judiciary or whether it should remain where it has traditionally resided—with elected policymakers responsible to the people.

The pros and cons of pursuit under various circumstances have been vigorously debated and will continue to be debated. *Amicus* CJLF does not propose any definite answers to this debate in this brief. Our point is that the issues are close enough and complex enough that police pursuit policies should be established by the elected branches and not by federal judges or juries.

The popular image of the "high-speed chase" comes primarily from Hollywood. These ubiquitous "action scenes" bear little resemblance to reality. See California Highway Patrol, Pursuit Study 4 (1983) (cited below as "CHP Study"). Other, more serious, statements about police pursuit have also been disconnected from reality. A widely cited 1968 publication by a group called Physicians for Automotive Safety claimed that one in five pursuits ended in death. This "study" was based on reading newspaper clippings, creating an obvious and extreme sampling bias. See CHP Study, at 8-9. Chases resulting in death are far more likely to be reported in the press than chases that terminate with neither injury nor property damage.

From April through September of 1982, the California Highway Patrol collected data from its own officers and from

ten local law enforcement agencies in a variety of jurisdictions.[4] There were seven fatalities in 683 pursuits. See *id.*, at 22-23. That is one percent, one-twentieth of the rate claimed by the Physicians for Automotive Safety. Other studies yield similar results. Alpert & Dunham, Policing Hot Pursuits: The Discovery of Aleatory Elements, 80 J. Crim. L. & Criminology 521 (1989), report on the results of a 1987 study in Dade County, Florida. This study included 323 pursuits. *Id.*, at 527. There were three fatalities, all of them suspects, a rate of less than one percent. *Id.*, at 528. There were 75 injuries, but 87% of those were minor. *Ibid.*

The benefits of pursuit, or conversely the costs of a no-pursuit policy, are quite substantial. Statewide California data for 1994 indicate that 70% of pursuits are begun for infractions or misdemeanors. California Highway Patrol, The Evaluation of Risk: Initial Cause v. Final Outcome in Police Pursuits 8 (1995). Yet 73% of successful pursuits end in a felony arrest. *Id.*, at 9. Unfortunately, the data reporting system does not fully disclose how many of those felony arrests include a felony other than the felony of evading an officer. See *id.*, at 25. An informal CHP survey examined 2,601 pursuits beginning with an infraction and ending with a felony arrest. See *id.*, at 22. The results, see *id.*, at 23, are as follows:

4. Participating agencies included San Francisco, Merced (a small city in an agricultural area), and a variety of areas in between. CHP Study, at 10.

Felony evading only	511	19.6%	
Felony evading & misdemeanor	74	2.8%	
Felony evading & "wanted"	17	0.7%	
Felony evading & another felony	356	13.7%	} 76.9%
Total felony evading	958		
Other felonies only	1,643[5]	63.2%	
Total	2,601		

Thus, the criticism that the large percentage charged with felonies is the result primarily of the pursuits themselves is not valid. Over three-quarters of pursuits begun for infractions and ending in felony arrests include a felony charge other than evading. This result is consistent with the Alpert and Dunham study. "While a majority of the pursuits were initiated for relatively minor traffic infractions, many of those apprehended were charged with serious felony offenses unrelated to the pursuit (nearly 50%). This indicates that many offenders flee from the officer because of concern over more than the traffic offense that initiated the pursuit." Alpert & Dunham, 80 J. Crim. L. & Criminology, at 535.

A person who drives recklessly while evading an officer commits a serious offense, see Cal. Veh. Code § 2800.2, in addition to endangering himself and others. A person who would do that either fears arrest for another, more serious, offense or has so little regard for the law and for the safety of others that he would incur such risks on minimal provocation. Either way, the arrest of such a person is an important enhancement to public safety.

Just as important as the direct benefit of pursuit is the indirect benefit. If people know that they will be pursued, and probably caught, few will flee. Conversely, if a law enforce-

5. This number is implicit in the fact that all 2,601 were charged with felonies, see *id.*, at 22, and only 958 with felony evading.

ment agency prohibited pursuits, and if that policy were publicly known, it would amount to a license to evade arrest merely by driving recklessly. As the CHP noted in its 1983 study,

> "Attempted apprehension of motorists in violation of what appear to be minor traffic infractions is necessary for the preservation of order on the highways of California. If approximately 700 people will attempt to flee from the officers who participated in this six-month study, knowing full well that the officers would give chase, one can imagine what would happen if the police suddenly banned pursuits. Undoubtedly, innocent people may be injured or killed because an officer chooses to pursue a suspect, but this risk is necessary to avoid the even greater loss that would occur if law enforcement agencies were not allowed to aggressively pursue violators." CHP Study, at 21.

If only a tiny fraction of the millions of people stopped annually were to evade police as the result of a no-pursuit policy, the number of such evasions would be many times the present number of pursuits. They would be shorter, of course, because the offender need only drive at high speed until he is out of sight. But the average pursuit is already short, with most pursuits being less than five miles. See CHP Study, at 24. A much larger number of somewhat shorter reckless driving episodes would not necessarily be a net gain in public safety. It could very well be a net loss.

B. The Jury as Policymaker.

Absent a constitutional rule in this area, the elected branches of government can weigh the competing considerations in the light of growing knowledge and improving technology.[6] Legislatures can decide the criteria for compensating persons

6. Technology may eventually provide safer alternatives, such as electronic devices to disable a car's ignition. See Sweeney, Vehicular Pursuit: A Serious—and Ongoing—Problem, 63 The Police Chief 16, 18 (Jan. 1997).

injured in collisions resulting from pursuit. City councils and county boards can establish pursuit policies, or insure that their agencies do so. These decisions can be based on the total costs to society of these pursuits and on the total benefits from them.

On the other hand, if a constitutional rule is established by judicial fiat, avoiding liability is likely to become the driving force. Injuries and deaths for which the county can be sued will "count" more than equally serious accidents which cannot result in liability. If a no-pursuit policy permits a severely intoxicated driver to escape, and he kills someone miles down the road, the county is not liable. See *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196-197 (1989) (no liability for failure to protect). If the same drunk killed someone during an attempt to stop him, there would be an arguable case for liability under the Ninth Circuit's rule in this case. Under such a regime, a cash-strapped county will be under strong pressure to forego the path of minimum danger in favor of the path of minimum liability. The paths may well be different.

The problem is exacerbated when liability is determined by juries instructed in vague terms. As this Court is well aware, juries sometimes hand down astonishing verdicts for conduct which the "tortfeasor" reasonably believed was entirely proper. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. ___, 134 L. Ed. 2d 809, 828, 116 S. Ct. 1589, 1601 (1996). A jury is presented with a concrete case of a person actually injured or killed in a pursuit, while the other people who might have been injured or killed as a result of not pursuing are mere abstractions. It would be unrealistic to expect detachment, objectivity, and a balanced assessment of the risks apparent at the time the police acted. Yet that is the kind of decision-making that good policy formation requires.

The case for federal constitutional intrusion in this area would be stronger if pursuit policy were the result of "prejudice against discrete and insular minorities," see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), without power in the political process. But injury to innocents

from police chases is a largely random event. Both the costs and the benefits are spread over the whole populace.[7] There is no reason to regard the democratic process with a suspicious eye on this issue.

III. The California Legislature has considered this issue and struck an appropriate balance.

Sovereign immunity, as a general rule, has been abolished in California. Absent a specific statute, California public entities are liable for the torts committed by employees acting within the scope of their employment. Cal. Govt. Code § 815.2(a); 5 B. Witkin, Summary of California Law § 150, p. 231 (9th ed. 1988). Scope of employment is broadly defined. It includes peace officers who misuse their authority. See *Mary M.* v. *Los Angeles*, 54 Cal. 3d 202, 221, 814 P. 2d 1341, 1352 (1991); 5 Witkin, *supra*, § 151, at pp. 70-74 (1996 Supp.).

For automobile accidents, the law is even more specific. "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of a public entity acting within the scope of his employment." Cal. Veh. Code § 17001. For emergency vehicles, the individual operator has immunity, Cal. Veh. Code § 17004, but the public employer remains liable. See *Brummett* v. *County of Sacramento*, 21 Cal. 3d 880, 885, 582 P. 2d 952, 955 (1978); *Thomas* v. *City of Richmond*, 9 Cal. 4th 1154, 1157-1158, 892 P. 2d 1185, 1186-1187 (1995); 5 Witkin, *supra*, § 231, at 316-317.

This latter immunity serves many of the same goals as this Court's qualified immunity jurisprudence. Victims of crime, fire, and other deadly dangers need emergency vehicles to

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7. There is, of course, one group far more likely to be killed or injured in police chases: the perpetrators. But criminals are not a suspect classification, and in any event it would be ludicrous to suggest that a person suffers a constitutional deprivation from the natural consequence of his own voluntary, criminal act.

respond quickly. If the people who drive them are overly concerned with the devastating impact of personal liability, they may be excessively cautious and excessively slow in responding, even if such slowness means a substantial net loss of life. See *Richardson* v. *McKnight*, 521 U. S. ___, 65 U. S. L. W. 4579, 4582 (June 23, 1997) ("protecting the public from unwarranted timidity" as purpose of immunity doctrine). Public safety, on the whole, is better served by individual immunity, while compensation of those injured by negligent operation of emergency vehicles is better served by holding the entity liable in appropriate cases. Of course, an employee will have some concern about incurring liability to the employer, which may result in demotion or discharge, but that concern is less likely to cause hypercaution than is the spectre of devastating personal liability.

For pursuit cases, the California Legislature has refined the rule one step further. To encourage public entities to develop pursuit policies, the Legislature has provided immunity from liability for collisions with the *pursued* vehicle if the entity has adopted a policy that meets certain standards. Cal. Veh. Code § 17004.7. The Legislature has made a judgment that the adoption of these policies will result in an overall reduction in the frequency of accidents. See *Berman* v. *City of Daly City*, 21 Cal. App. 4th 276, 280-281, 26 Cal. Rptr. 2d 493, 495 (1993).

Finally, the people of California have decided, through direct exercise of their reserved legislative power, see Cal. Const., Art. IV, § 1, that when more than one person is responsible for an injury, liability for noneconomic damages should be several and not joint and proportionate to fault. Cal. Civ. Code § 1431.2. The people passed this initiative for the specific purpose of protecting the financial integrity of their local governments and the ability of those governments to provide essential services. Cal. Civ. Code § 1431.1. This value judgment is particularly applicable to police pursuit cases, since such cases will nearly always involve a tortfeasor more at fault than the police officer: the perpetrator.

Plaintiff in this case proposes, in effect, that the federal courts should take a machete to this tapestry. The Legislature's decision to provide clear immunity to the operators of emergency vehicles would be nullified and replaced with nebulous doctrines of qualified immunity and "willful disregard" liability. The incentive for public entities to adopt pursuit policies in exchange for immunity would be vastly reduced, as they would still have to litigate the new federal liability. The considered judgment of the people of California regarding joint and several liability for noneconomic damages would be nullified.

In the present case, California law provides two remedies for the plaintiffs. First and foremost, they have a clear cause of action for both compensatory and punitive damages against the *real* perpetrator in this case, the operator of the motorcycle, Brian Willard. His outrageous and inexcusable act deserves the most severe condemnation. Unlike the sheriff's deputy, who must weigh competing concerns in a very short time, Willard had absolutely no justification for his actions. Second, to the extent that they can show a public employee was negligent in his operation of a motor vehicle, California Vehicle Code section 17001 provides a remedy.

There is no "arbitrary imposition" or "purposeless restraint" at work here. Cf. *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting). The people of California, through the democratic process, have struck a reasonable balance among the difficult and weighty public policy issues in this area. The need for federal intervention is minimal, if any. The disruptive effect of such intervention would be substantial.

IV. Substantive due process claims should be limited to intentional deprivations.

In *Parratt* v. *Taylor*, 451 U. S. 527 (1981), overruled in part in *Daniels* v. *Williams*, 474 U. S. 327, 330-331 (1986), Justice Powell defined the question this way—"In the due process area, the question is whether intent is required before there can be a

'deprivation' of life, liberty or property." *Id.*, at 548 (opinion concurring in the result). The answer, according to Justice Powell, is yes. *Ibid.* He also warned that, even though the majority opinion was based on procedural due process, the substantive due process implications would "create new uncertainties as well as invitations to litigate under a statute [42 U. S. C. § 1983] that has already burst its historical bounds." *Id.*, at 553-554.

Amicus CJLF respectfully submits that Justice Powell was correct. It is time to recognize the wisdom of his opinion and adopt the rule he proposed.

A. Mental State, Section 1983, and Vicarious Liability.

By this point, it is well established that 42 U. S. C. § 1983 has no mental state element as such. See, *e.g.*, *Parratt*, 451 U. S., at 534-535 (quoting *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961)). Section 1983 merely provides a procedural vehicle for civil redress of an underlying violation of the Constitution. *Graham* v. *Connor*, 490 U. S. 386, 393-394 (1989). The mental element, therefore, is provided by the underlying violation. See *id.*, at 394.

This otherwise clear distinction becomes somewhat blurred when the person or entity sued is someone other than the one who personally committed the violation. The rule of respondeat superior does not apply. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694-695 (1978). Under *Monell*, "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *Canton* v. *Harris*, 489 U. S. 378, 385 (1989) (emphasis in original). For a "failure to train" claim, the "deliberate indifference" standard applies. *Id.*, at 388.

Yet despite the language of *Monell* and *Canton*, these cases remain a species of vicarious liability. "[N]either *Monell* . . . nor any of our other cases authorizes the award of damages against a municipal corporation based on the action of one of its officers when in fact the jury has concluded that the officer

inflicted no *constitutional* harm." *Los Angeles* v. *Heller*, 475 U. S. 796, 799 (1986) (*per curiam*) (emphasis added). Thus, a finding that the officer lacked the requisite mental state for the underlying alleged violation would negate municipal liability, even if the "deliberate indifference" standard for the city's own failure to train had been met.

In a sense, then, section 1983 does have a mental element of its own. When the plaintiff seeks to hold the municipality liable for the officer's actions, the "deliberate indifference" standard for the policymaker's mental state is layered on top of whatever mental state the particular claim requires on the part of the officer. This is "a substitute for the doctrine of respondeat superior" in such cases. *Collins* v. *City of Harker Heights*, 503 U. S. 115, 124 (1992). Deliberate indifference is the standard for the underlying claim, however, only in one type of Eighth Amendment case, and that is the type least analogous to the present case.

B. Fourth and Eighth Amendment Claims.

Graham v. *Connor* "reject[ed] [the] notion that all excessive force claims brought under § 1983 are governed by a single generic standard." 490 U. S., at 393. For both section 1983 claims and claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham*, 490 U. S., at 394 and n. 9.

For claims governed by the Fourth Amendment, "the 'reasonableness' inquiry in an excessive force case is an objective one . . . ." *Id.*, at 397. The officer's good-faith belief that the force is reasonable is not a defense. See *ibid.* While Fourth Amendment excessive force jurisprudence does have substantial problems, see *Tennessee* v. *Garner*, 471 U. S. 1, 32-33 (1985) (O'Connor, J., dissenting), it also contains an important self-limiting factor. The Fourth Amendment is simply inapplicable unless there has been a "search" or a

"seizure." "Violation of the Fourth Amendment requires an *intentional* acquisition of physical control." *Brower* v. *Inyo County*, 489 U. S. 593, 596 (1989) (emphasis added). A seizure occurs, for Fourth Amendment purposes, "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.*, at 597 (emphasis in original). This standard does not include crashes in the course of a pursuit unless intentionally caused, *e.g.* by sideswiping the pursued vehicle. *Ibid.* Fourth Amendment liability, for all its problems, is less "open-ended" and has more "guideposts" than substantive due process. *Albright* v. *Oliver*, 510 U. S. 266, 271-272, (1994) (plurality). Its broad "objective reasonableness" test is therefore less of a problem than an open-ended *mens rea* for substantive due process would be.

For Eighth Amendment claims of failure to provide medical care to prisoners, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) established a "deliberate indifference" standard. In *Whitley* v. *Albers*, 475 U. S. 312, 317-318 (1986), the Ninth Circuit had applied that standard to an excessive force claim. This Court reversed, holding that the standard applicable to prison security measures taken during a disturbance was " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2 1973) (Friendly, J.)." *Whitley*, 475 U. S., at 320-321. *Hudson* v. *McMillian*, 503 U. S. 1, 6-7 (1992) extended the *Whitley* standard to all prison excessive force claims. Interestingly, Judge Friendly's language, adopted by *Whitley*, was based on a substantive due process theory, not on the Eighth Amendment. See *Johnson*, 481 F. 2d, at 1032-1033.

The difference between the *Whitley* standard and the *Estelle* standard cannot be explained by pondering the meaning of "punishment," cf. *Farmer* v. *Brennan*, 511 U. S. 825, 837-838 (1994), for both standards are based on the same clause of the Constitution. The difference lies in the different situations. One requires immediate action; the other allows time for thought. One requires the balancing of other safety concerns;

the other does not. "[A] deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U. S., at 320.

Comparing the present case to the *Whitley-Estelle* dichotomy, we see it falls squarely on the *Whitley* side. Officers must act in haste and under pressure, and they must balance the risks of pursuit against both the direct and indirect costs of allowing offenders to escape. See *ante*, at 8-11.

Thus, the two kinds of constitutional claims most closely analogous to the present one both have an intent element. The Fourth Amendment only applies to intentional acquisitions of control, and the Eighth Amendment excessive force standard requires intentionally causing harm. In the prison security context, furthermore, *Whitley* expressly held that the protection of substantive due process extends no further than the standard announced in that case. 475 U. S., at 327.

C. Fuzzy Standards and Zones of Conduct.

The problem with the "deliberate indifference" standard is its failure to clearly inform police officers in advance what conduct will be considered a violation. This is illustrated by the decision below, which denied Deputy Smith's claim of immunity despite a precedent in another circuit holding that substantially the same facts did not state a cognizable claim. See *Temkin* v. *Frederick County Com'rs*, 945 F. 2d 716, 717, 723 (CA4 1991).

Whenever a court or a legislature establishes a standard of law, there are three zones of conduct established. Zone A is the conduct actually proscribed by the standard. A person who commits conduct in that zone is properly subject to punishment or payment of damages. Zone B is conduct which does not actually violate the standard, but which is close enough to go to

trial. Zone C is that conduct which is so clearly not a violation of the standard that any claims are quickly dismissed.

The big problem, of course, is Zone B. People whose conduct lies within Zone B are innocent, yet they are forced into the expense and trouble of discovery and trial, and they face the risk of being subjected to an errant jury decision. Innocent defendants in this zone often pay very substantial settlements on bogus claims simply to be rid of the litigation. Such cases are a form of legalized extortion.

Not only does such a standard victimize innocent people, but it "chills" lawful conduct by people who fear these consequences. In the context of police pursuits, officers and police departments will forego pursuits which an independent balancing would say are worth the risk.

As Justice Powell noted 16 years ago, 42 U. S. C. § 1983 "already ha[d] burst its historical bounds." *Parratt* v. *Taylor*, *supra*, 451 U. S., at 554. As he correctly predicted, the *Parratt* majority's equivocation on whether unintended deprivations can be constitutional violations has created uncertainties and invitations to litigate. *Id.*, at 553-554. This Court has already found it necessary to overrule *Parratt* in part and accept Justice Powell's position in part, excluding mere negligence claims. *Daniels* v. *Williams*, *supra*, 474 U. S., at 330-331. It is time, *amicus* submits, to go the rest of the way and accept Justice Powell's position in full. It is time to put an end to the uncertainty and hold that "substantive due process" is violated only by intentional deprivations. See 451 U. S., at 548.

Once this is done, substantive due process protection in the police pursuit context coincides with that of the Fourth Amendment, just as it does in other contexts. See *Albright* v. *Oliver*, 510 U. S. 266, 288-289, n. 2 (1994) (Souter, J., concurring in the judgment). An intentional deprivation in this context is a seizure under *Brower* v. *Inyo County*, 489 U. S. 593, 596-597 (1989), and Fourth Amendment jurisprudence provides the controlling standard under *Graham* v. *Connor*, 490 U. S. 386, 393 (1989).

V. The rule of *Parratt* v. *Taylor* should apply to all due process claims, whether procedural or substantive.

Justice Powell's position in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), discussed in the preceding part, was based in part on his concern that the majority's rule could be evaded simply by recasting the claim as substantive, rather than procedural, due process. See *id.*, at 552-554 (opinion concurring in the judgment). The present case illustrates that his concern was well founded. A different but related approach to the same problem was stated by Justice Kennedy in *Albright* v. *Oliver*, 510 U. S. 266, 285 (1994) (opinion concurring in the judgment):

> "But the price of our ambivalence over the outer limits of *Parratt* has been its dilution and, in some respects, its transformation into a mere pleading exercise. The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter) and by treating claims based on the Due Process Clause as claims based on some other constitutional provision. See *Taylor* v. *Knapp*, 871 F. 2d 803, 807 (CA9 1989) (Sneed, J., concurring). It has been avoided at the other end of the spectrum by construing complaints alleging a substantive injury as attacks on the adequacy of state procedures. See *Zinermon* v. *Burch*, 494 U. S. 113, 139-151 (1990) (O'Connor, J., dissenting); *Easter House* v. *Felder*, 910 F. 2d 1387, 1408 (CA7 1990) (Easterbrook, J., concurring). These evasions are unjustified given the clarity of the *Parratt* rule: In the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*.' 451 U. S., at 536."

The substantive law of California is that drivers of emergency vehicles are exempt from specific rules of the Vehicle

Code, but "they are not relieved of the general duty to drive with due care . . . ." 5 B. Witkin, Summary of California Law § 230, p. 315 (9th ed. 1988). Any driving action that would meet a heightened *mens rea* requirement beyond negligence would necessarily be an action unauthorized by California law.

If we look past the forms of pleading, we see that the essence of the complaint in this case is the same as in *Parratt*, *Hudson* v. *Palmer*, 468 U. S. 517 (1984), and *Albright*. In all three cases, the plaintiff's injury was the result of an allegedly wrongful act of an individual government employee and not a failure to provide a predeprivation hearing or other process. See *Parratt*, 451 U. S., at 530 (negligent loss of property by prison employees); *Hudson*, 468 U. S., at 230 (destruction of personal property during cell search); *Albright*, 510 U. S., at 268-269 (initiation of criminal proceedings). The line between "procedural" and "substantive" due process, although clear in other contexts, is vanishingly faint here.

The classic procedural due process claim is a contention that the procedure provided by the state is inadequate to test whether the deprivation is or is not justified by the substantive law. In *Fuentes* v. *Shevin*, 407 U. S. 67, 70, 96 (1972), for example, Mrs. Fuentes had no opportunity before seizure to state her position that, due to a breach of the seller's obligations, she had the right to withhold payment. The classic substantive due process claim is that the substance of state law violates a right "deeply rooted in our legal tradition," see *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4674 (June 26, 1997) or, in another view, that the state law "falls . . . outside the zone of what is reasonable in the way it resolves the conflict between the interests of the state and individual." *Id.*, at 4688 (Souter, J., concurring in the judgment). In such a case the adequacy of state procedure does not defeat the claim because any procedure would conclude with the enforcement of the unreasonable substantive law. See *id.*, at 4687 (quoting *Poe* v. *Ullman*, 367 U. S. 497, 541 (1961) (Harlan, J., dissenting)).

A case in which predeprivation process is impractical, state postdeprivation process is adequate, and state substantive law is reasonable fits neither of these categories squarely. That lack of fit suggests that claims in such cases are not due process claims at all.

Rochin v. *California*, 342 U. S. 165 (1952) is often cited as a substantive due process case, but it is not. Rochin was convicted of possession of morphine after he swallowed the evidence and the police forcibly extracted it from his stomach. *Id.*, at 166. The illegality of the officers' conduct was not an issue in this Court. Rochin had alleged a Fourth Amendment violation.[8] *People* v. *Rochin*, 101 Cal. App. 2d 140, 141, 225 P. 2d 1, 2 (1950); see also *id.*, at 144, 225 P. 2d 913, 914 (Carter, J., dissenting from denial of review) (discussing Fourth Amendment, parallel provision of state constitution, and exclusionary rule). The state court held that there had been a violation, but that Rochin's remedy was an action for damages. *Id.*, at 143, 225 P. 2d, at 3.

This issue before this Court in *Rochin* was the "conduct of the criminal proceedings," 342 U. S., at 168, *i.e.*, the use of that evidence to convict Rochin. Applying *Brown* v. *Mississippi*, 297 U. S. 278 (1936), a procedural due process case, *Rochin* held that the process by which Rochin had been convicted, not the extraction itself, violated the Due Process Clause. 342 U. S., at 173-174.

There are, of course, cases which entertain section 1983 actions on "Due Process . . . *simpliciter*" without inquiring about state law or remedies. *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), for example, was an action for damages by a person confined in an institution for the retarded, claiming unsafe and overly restrictive conditions and lack of training. *Id.*, at 309.

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8. The Fourth Amendment had been "incorporated" by 1952, although the exclusionary rule had not. See *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, 33 (1949), overruled on the latter point in *Mapp* v. *Ohio*, 367 U. S. 643, 654-655 (1961).

After discussing the standards for liability, the Court remanded for a new trial without ever mentioning state remedies. *Id.*, at 324-325. However, cases are not authority for questions which merely lurk in the record. *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

The Fourteenth Amendment does not forbid states from depriving people of life, liberty, or property; it only commands that due process of law be provided for such deprivations. U. S. Const., Amdt. 14, § 1. A contention that process is irrelevant to a constitutional provision that commands nothing but process is more than a little strange. Substantive review of legislation can come within the text of "due process" on the theory that the legislation itself works the deprivation and is part of the process. See *Poe*, *supra*, 367 U. S., at 541 (Harlan, J., dissenting). Where there is no attack on the content of state law, however, state process must be a factor if there is to be any connection at all with the actual text of the Fourteenth Amendment.

State tort law, not the Constitution, is the normal source for rules "to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U. S. 327, 332 (1986). The fact that the defendant is a peace officer does not, by itself, change that allocation. See *id.*, at 332-333. The command of the Fourteenth Amendment is addressed to the state. While the state can, does, and must act through its officers, it also acts through its laws and courts. When the state's laws and courts provide remedies for the losses that inevitably flow from a government operated by fallible humans, it is difficult to see how the state as a whole has failed in its constitutional obligation to provide due process of law.

We should not forget that "the Due Process Clause . . . was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' . . . ." *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196 (1989). Thus, while there is no "abuse of governmental power" element of section 1983 "*separate and apart* from the

proof of a constitutional violation," *Collins* v. *City of Harker Heights*, 503 U. S. 115, 119 (1992) (emphasis added), abuse or the lack of it is very relevant to the question of whether there has been a violation of the Due Process Clause. See *id.*, at 126.

The state has not abused its power in this case. It has provided a procedure, a forum, and a reasonable rule of law. It has provided all the process that is due. "The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer." *Albright*, *supra*, 510 U. S., at 284 (Kennedy, J., concurring in the judgment). The questions in this case are prime examples. There is no basis for federal intervention here.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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